In The
Supreme Court of the United States

CAROL FINK-HAGY,

Respondent,

v.

RALPH HAGY,

Petitioner.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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Dated: April 10, 2009

ECHO APPELLATE PRESS, 30 W. PARK AVE., LONG BEACH, NY (516) 432-3601
16726

QUESTION PRESENTED

Whether the New York Appellate Division, First Department's denial of Appellant's motion to extend time to perfect his appeal of an award of counsel fees in post judgment matrimonial litigation is improper given its important public policy ramifications.

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In the Supreme Court of the United States

No.

CAROL FINK-HAGY,

Respondent,

vs.

RALPH HAGY,

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On Petition for a Writ of Certiorari to the New York Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

Ralph Hagy respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals.

OPINIONS BELOW

Motion and Cross Motion were filed and served on January 5th, 2006 and January 27th, 2006 respectively.

The former motion was brought by Appellant father to hold the Plaintiff mother in contempt pursuant to Judiciary Law §753(A)(2) for alleged interferences with the father's visitation.

The latter motion was the Respondent mother's application for $25,000 in the form of counsel fees.

The issues were tried on June 20th and September 26th, 2006 and were fully submitted on January 19th, 2007. The issues of counsel fees were submitted on the papers.

The father's application was denied in totem but the mother's application yielded a $15,000 counsel fee award.

Father filed his notice of appeal of the resulting Order on March 12th, 2007 and did not perfect his appeal for an entire year.

Appellant filed on September 25th, 2008 a Motion to expand the amount of time to file his brief.

The First Department denied leave in an Order entered November 13th, 2008.

The New York Court of Appeals affirmed the First Department on January 22, 2009 affixing costs.

Notice of Entry of this Order was served and filed February 10, 2009, Appendix 1.

Order of the Supreme Court of the State of New York, County of New York dated and entered on February 6, 2007 with Decision and Order dated February 5, 2007 is at Appendix 2.

STATEMENT OF JURISDICTION

The decision of the New York Court of Appeals was filed on January 22, 2009. Appeal is due ninety days thereafter and this Petition for a Writ of Review is timely.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

New York Constitution, Article VI, § 3. a. The jurisdiction of the court of appeals shall be limited to the review of questions of law ... .

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

...

In civil cases and proceedings as follows:

...

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable under paragraph (1) of this subdivision where ... the court of

appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon application ... directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

SUMMARY

The objective of this Writ is to obtain review of the Order of the New York Court of Appeals and to enter an order vacating said Order of the Court of Appeals and remanding the matter with instructions for an appeal to be submitted and decided based upon its merits.

As to the matter below, Mr. Hagy has been kept on the post judgment matrimonial calendar for four years after his divorce action was fully submitted and Judgment was entered.

In New York, the typical post judgment applications are all heard before the Family Court based upon its concurrent jurisdiction with the New York Supreme Court and its much lower cost given the nature of its summary proceedings. However, Mr. Hagy was kept appearing in the Supreme Court at substantial expense and denied access to Family Court.

The objective of his former wife, Mrs. Hagy, was to minimize his contact with his daughter using the court's awesome powers: contempt, reduction of visitation via supervision and the power to create an unfairly prejudicial record making it appear as if Mr.

Hagy was an unfit parent for any reason his former wife wished to articulate. Counsel fee awards were another measure available to the court to regulate Mr. Hagy's access to his child.

One such example is a finding by a Referee that *it is obvious, particularly from an examination of* [Mr. Hagy's] *testimony given at the contempt hearing, that he is guilty of frivolous conduct by making material, factual false statements.*

Here, the Referee was acting as a lie detector having listened to Mr. Hagy's allegation that the former wife was withholding contact between him and his daughter. The result is a record giving the impression the Mr. Hagy is a frivolous litigator. He is incredible, "vague and self-serving," according to the Referee.

On the other hand, the Referee awarded a counsel fee amount of $15,000 to the former wife's law firm.

What was the basis? The Referee found that Mr. Hagy was "clearly very hostile" to his former wife. The Referee allowed the former wife's law firm to place on the record the wife's testimony of the husband's rants against his wife, but no recordings or other evidence was ever presented or required. Hence, the Referee found that Mr. Hagy directs *invective and obscenities* to his former wife.

It is respectfully submitted that this runs afoul of New York law.

It is also respectfully submitted that the Referee "believed" everything the mother's law firm presented and believed nothing that Mr. Hagy and his law firm presented.

For example, the Referee accepted as true wife's assertion that Mr. Hagy left his daughter alone in his automobile while he went to purchase beer. Nothing was presented as evidence to support such a claim except the words of the former wife.

As another example, because the Referee did not believe anything Mr. Hagy testified to, under New York law, he can be held to have conducted litigation frivolously and maliciously by being found to be lying under oath. A difficult to prove allegation like a missed visit becomes a lie based upon the Referee's subjective opinion of the man's veracity.

The Referee did more. In the case *sub judice*, the wife's law firm failed to execute a post judgment matrimonial retainer agreement prior to moving for counsel fees. The trial judge accepted an outdated retainer as current, and the Referee deemed that to be the "law of the case". Hence, errors that would otherwise be glaring and fatal to a prayer for relief now become excusable and even authorized by the trial court via its orders.

Moreover, in the case *sub judice*, the Referee failed to articulate the rule of counsel fees and then apply how the facts in this case yield an award of counsel fees.

The rule in New York is that counsel fees should be awarded to level the economic playing field between the marital parties.

New York Domestic Relations Law ("DRL") §237(b) provides that "upon any application to ... modify [a] judgment for ... custody, visitation ... of a child ... by ... order to show cause ..., the court may direct a ... parent to pay such sum or sums of money for the prosecution ... of the application ... [when] justice requires... having regard to the circumstances of the case and of the respective parties."

DRL §237(d) provides in pertinent part: In determining the appropriateness and necessity of fees, the court shall consider:

1. The nature of the marital property involved;
2. The difficulties involved, if any, in identifying and evaluating the marital property;
3. The services rendered and an estimate of the time involved; and
4. The applicant's financial status.

In this case, Mr. Hagy is burdened with child support and works as a New York State Bridge and Tunnel Inspector on again- off again. His job is not steady. The former wife is a retired bond trader having earned up to $750,000 annually for years. Hence, the mother is the moneyed spouse being awarded counsel fees without adherence to the statute.

STATEMENT OF THE CASE

Factual Background

The parties were married on April 29, 2000. The child, a female named K (anonymous) was born March 12, 2001. The plaintiff/respondent commenced a divorce action on April 19th, 2002 and after two days of trial, the parties settled the issues of custody and visitation via oral stipulation on September 16th, 2003 which was incorporated but not merged in the Judgment of Divorce on April 27th, 2004, waived any claims for maintenance and equitable distribution, held an inquest on grounds and agreed to submit the remaining financial issues to the court by way of written motion in lieu of further oral testimony. On January 6, 2004, an order was entered that requires the father be responsible for medical coverage and prior unreimbursed necessary medical, dental and optical expenses.

The case is in post-judgment matrimonial court since the date of the entry of the divorce judgment.

The Plaintiff mother is the moneyed spouse and is perpetually applying to the matrimonial court for orders curtailing the Appellant father's contact with the child.

The Appellant father typically cross moves for enforcement of his visitation schedule.

After nearly two dozen applications for various relief, it is apparent from the clerk's record of this case that Plaintiff Respondent almost always gets

counsel fees on motion. The Appellant Defendant has never once been granted counsel fees; he has instead been sanctioned in the form of having to pay counsel fees in clear violation of the statute that is intended to level the financial playing field for the non-moneyed spouse. He cannot even further an appeal because of the denial of his motion to perfect his appeal.

Appellant Defendant has also endured supervised visitation, denial of any expert participation in his case, denial of a law guardian for his child, a breath alcohol ignition interlock device (based upon the trial court's finding that he drank a *mysterious red liquid*) in his automobile and numerous appearances. Family Court does not have concurrent jurisdiction because the Divorce Judgment dated April 15th, 2004 omits mention of Family Court.

Statutory authority seems to not apply in this case. The authority to award counsel fees in a matrimonial action is derived from statute, not from the common law and not from punitive ideations. *Romaine v. Chauncey*, (1892) 129 N.Y. 566, 29 NE 826; *Kagan v. Kagan*, (1986) 21 N.Y.2d 532; *Caldwell v. Caldwell*, (1948) 298 N.Y. 146; *Erikenbrach v. Erikenbrach*, (1884) 96 N.Y. 456; *Griffin v. Griffin*, (1872) 47 NY 134.

In matrimonial cases, Domestic Relations Law §237 applies. Its intention is to level the financial playing field for the parties.

It provides that an award of counsel fees be made 1. at the discretion of the court, 2. having

regard to the financial circumstances of the parties, 3. having regard to the circumstances of the case, and 4. as justice requires. Nearly identical provisions exist nationwide.

Nowhere in this case has there ever been an analysis that detailed these four elements. Due process becomes a vapor.

For example, as to the Referee's Order being appealed herein, the court described how the father hated the mother as if the court was a lie detector. *Plaintiff testified credibly that defendant directs invective and obscenities at her in the context of visitation.* How does the court know this to be true? The court concluded that pursuant to 22 NYCRR §130-1.1, Appellant *is guilty of frivolous conduct by making material, factual false statements,* but nowhere does the court tell us what those statements are and how they were material to the requests for relief being made by the Appellant.

What does any of this have to do with DRL §237?

We are taught in law schools that financial distributions in matrimonial cases have some connection with the financial prowess of the litigants in each case. This is as if to say that leveling the financial playing field between the parties is the underlying public policy in each and every case heard by a matrimonial judge. Why not in Fink v. Hagy?

Here, an arbitrage was orchestrated. The Court accepted as the mother's income only her

interest payments from the seven figure "investments" she held. This gave the appearance that she was the servient spouse therefore entitled to counsel fees.

If the father yelled obscenities at the mother, how does this address the circumstances of the case? Does justice require the father be punished with counsel fees if he yells invective at the wife? DRL §237 seems to not allow such a punishment, yet counsel fee awards flow freely against the Appellant Father at roughly $15,000 a clip.

Anecdotally, for each motion filed by the father, a cross motion by the mother seeks fees. The father loses.

Finances of the parties are a consideration nearly completely absent from this case. The only time a cogent analysis of the Plaintiff respondent's wealth appeared anywhere was in the court's judgment of divorce.

The Trial Court: *For approximately 14 years, plaintiff had a successful career as a corporate bond trader at Morgan Stanley, earning an annual salary that ranged from $125,000 to $750,000*. Decision and Order, February 6th, 2004.

There is not one single income tax statement anywhere in this case revealed by the Plaintiff Respondent. We do not know whether her salary range was based upon her own assertions made in court or via income statements, W-2's, tax returns or any other indicia of income. This may be a gross

deviation from the mother's true income posture that may be unjust to the father and if so, such deviation may violate federal law. 42 U.S.C.A. §667(b)(2) for child support calculation purposes.

What is even more surprising is that the court adopted mother's income as $9,214 in unemployment compensation, $11,441 in wages, and $20,842 in dividend and interest income for a total of $41,497.00 with no mention of whether she draws any other amounts from her nest egg. (DRL §240 (1-b)(e)). Mother is therefore able to live in a doorman building on 5th Avenue in Manhattan and retain Bender, Burroughs and Rosenthal for six years of litigation on an annual income of $41,000?

Assuming *arguendo* the mother earned a half million dollars across each of the fourteen years she was a bond trader, that is a nest egg of $7 million dollars. This is declared nowhere in this record yet seems to represent a more accurate snapshot of mother's net worth. Appellant father is on a fixed salary as a bridge and tunnel inspector, yet the mother draws awards of counsel fees.

Incidentally, Plaintiff respondent was served with a discovery demand on July 26, 2005 to produce her income information as well as information regarding her net worth and a notice for a deposition. Failing to provide information and failing to appear for a deposition, a motion to compel disclosure filed September 20, 2005 was denied.

Appellant father's income was fixed at $73,489.00 (which included a rental income of $1,600

per month for $19,200 per year). So child support was fixed at $1,034. That amount has not varied since its entry whether the father was employed or not.

It is respectfully submitted that if indeed the Plaintiff respondent has $7 million in the bank that any award of counsel fees against him.

A notice of appeal as to $15,000 of these fees was filed on February, 2007.

On September 17th, 2008, Appellant sought an Order granting him an extension of time to file his Brief challenging this order.

The Appellate Court has the power to cure Appellant's omission of filing a timely brief many months after the time to appeal has expired. *Gamble v. Gamble*, 23 A.D.2d 887, 259 N.Y.S.2d 910 (2d Dept. 1965). This was *not* a request to extend the thirty day window to file a notice of appeal but rather a request to extend the time to file the brief.

This was the first such request made by Appellant in this matter and is not based upon careless oversight; but rather by a strategy to save precious resources in the face of ongoing litigation (there was another counsel fee hearing January, 2008 with a decision still pending) and to combine issues on appeal in the interests of judicial economy.

The Appellate Division First Department denied the father's motion.

The New York Court of Appeals affirmed and affixed costs.

It is a shame that K (anonymous) will enjoy fewer assets for the future. She has been deprived of the able assistance of counsel throughout this case and has been seen by only her mother's lawyers. Appellant Father is unable to provide for his child on visits because he has to pay the Respondent Mother's counsel fees in violation of the statute.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

New York Courts have so far departed from the accepted and usual course of matrimonial judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory powers.

REASONS FOR GRANTING THE WRIT

All spouses deserve an opportunity to properly defend their divorce cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: Ozone Park, New York
March 29th, 2009

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APPENDIX 1

COURT OF APPEALS
STATE OF NEW YORK

----------X

CAROL FINK-HAGY, Plaintiff-Respondent, -against- RALPH HAGY, Defendant-Appellant.	Supreme Court NY Co. Clerk's Index No. 350259/02 M-4637 Court of Appeals #08/1352 **NOTICE OF ENTRY**

----------X

PLEASE TAKE NOTICE that the within is a true copy of a Decision entered in the office of the Clerk of the within named Court on January 22, 2009.

Dated: New York, New York
February 10, 2009

BENDER & ROSENTHAL LLP
Attorneys for Plaintiff-Respondent
451 Park Avenue South - 8th Floor
New York, New York 10016
(212) 725-7111

To: Peter C. Lomtevas, Esq.
Attorney for Defendant-Appellant
101-54 106th Street
Ozone Park, New York 11416
718-849-5314

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second day of January, 2009

Present, HON. CARMEN BEAUCHAMP CIPARICK
Acting Chief Judge, presiding.

Mo. No. 1352
Carol Fink-Hagy,
Respondent,
v.
Ralph Hagy,
Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

/S
Stuart M. Cohen
Clerk of the Court

Motion for leave to appeal
denied with one hundred dollars
costs and necessary reproduction
disbursements.

Decided January 22, 2009
Mo. No. 2008-1352

Carol Fink-Hagy,
Respondent,
v.
Ralph Hagy,
Appellant.

APPENDIX 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

CAROL FINK-HAGY,

Plaintiff,

-against-

NOTICE OF ENTRY

RALPHHAGY,

Index No. 350259/02

Defendant.

PLEASE TAKE NOTICE that the within is a true copy of a DECISION AND ORDER dated February 5, 2007 and entered in the office of the Clerk of the within named Court on February 6, 2007.

Dated: New York, New York
February 16, 2007

BENDER BURROWS & ROSENTHAL LLP
Attorneys for Plaintiff
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(212) 725-7111

TO: James J. Sexton, Esq.
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Attorneys for Defendant
130 North Main Street - Suite 201
New City, New York 10956
(845) 708-9100

SUPREME COURT OF THE STATE OF NEW YORK-- NEW YORK COUNTY

PRESENT: *Marian Lewis , Special Referee* PART S8R
Index Number: 350259/2002

FINK-HAGY, CAROL
vs
HAGY, RALPH
Sequence Number: 017
HEAR AND DETERMINE

Index No. _____
Motion Date _____
Motion Seq. No._____
Motion Cal. No. □
____

The following papers, numbered 1 to __ were read on this motion to/for _____

	Papers Numbered
Notice of Motion/ Order to Show Cause	
Affidavits - Exhibits ..._____	_____
Answering Affidavits,- Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: □ Yes □ No
Upon the foregoing papers, it is ordered that this *Reference is disposed of in conformity with the decision and order filed herewith.*

FILED
February 6, 2007
New York County Clerk's Office

Dated: *February 5, 2007* *Marian Lewis, J.S.C.*
Check one: ☐ FINAL DISPOSITION ☑NON-FINAL DISPOSITION
Check if appropriate: ☑ DO NOT POST ☑REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL REFEREE PART 88

----------x

CAROL FINK-HAGY,

Plaintiff,

-against-

RALPH HAGY,

Defendant.

Index No. 350259/02

DECISION & ORDER

----------x

MARIAN LEWIS, SPECIAL REFEREE:

Plaintiff former wife, Carol Fink-Hagy, and defendant former husband, Ralph Hagy, were married on April 29, 2000. Their only child, Kaitlyn Marie Hagy was born on March 12, 2001. Plaintiff commenced the captioned action for divorce in April of 2002.

FILED
February 6, 2007
New York County Clerk's Office

On September 16, 2003, the parties entered into a stipulation of partial settlement which was placed on the record. This stipulation resolved the issues of custody and visitation. However, the financial issues relating to the marital dissolution, including child support, were resolved by Hon. Joan B. Lobis, J.S.C., the IAS Justice presiding, in a decision and order dated February 6, 2004.

The judgment of divorce was signed on April 15, 2004 by Justice Lobis and was entered in the office of the County Clerk on April 24, 2004. The stipulation was incorporated but not merged into the judgment, and survives.

Pursuant to the terms of the stipulation, plaintiff is the custodial parent, subject to defendant's parenting time.

The stipulation provided that defendant would have access to Kaitlyn commencing as of the date of the stipulation, and for four months thereafter, on alternate Sundays commencing at 9 am until 6 pm, with one longer weekend per month, when visitation would commence on Saturday at 4 pm and terminate on Sunday at 6 pm.

After the expiration of the initial four month period, defendant's parental access was expanded to every other weekend, commencing Saturday at 4 pm and continuing until Sunday at 6 pm.

Commencing seven months after the date of the stipulation, defendant's visitation was expanded to include alternate Fridays, commencing at 4 pm until Sunday at 6 pm.

In addition to the foregoing, defendant is entitled to visitation with Kaitlyn on Wednesdays, commencing at 4 pm and continuing until 7 pm. He has the option of a visit on Monday evenings, commencing at 4 pm and continuing until 7 pm. However, in order to exercise this optional visitation, he must provide plaintiff with 24 hour notice of his intention to exercise this visitation. If he intends to cancel any scheduled visitation, he is required to advise plaintiff within 48 hours.

As of the date of the stipulation, both parties became entitled to "reasonable daily telephone access" to Kaitlyn, when the child was with her other parent, and defendant was entitled to access to all educational, medical, dental, child care, healthcare and other child-related records, information or documents relating to Kaitlyn. Plaintiff was to

execute any written authorization necessary to effectuate this undertaking.

The parties were also to agree upon an appropriate mental health professional to work with them in developing a co-parenting relationship, and both parties were to attend sessions with the professional, and participate in good faith.

Within ten days of the stipulation, plaintiff was to provide defendant with an updated list of the child's service providers, including an address and telephone contact for same.

During the summer of 2004, defendant was to be entitled to four days of vacation time with Kaitlyn, and was to provide plaintiff with a detailed itinerary. After the summer of 2004, defendant was to have vacation time with Kaitlyn which was "age and developmentally appropriate."

Finally, the parties were to continue to maintain the baby log or diary which they maintained, and within 30 days of the stipulation, they were to exchange a detailed calendar, with a proposed visitation schedule for all legal and religious holidays, and were to attempt to agree upon a holiday schedule which was acceptable to both parties.

Both parties waived their right to equitable distribution and maintenance. However, by court order, defendant was directed to pay child support in the sum of $1,034 per month, retroactive to April 19, 2002, with credit for any actual child support paid pursuant to the pendente lite order dated October 22,2002, and for any additional support for which he could prove payment Defendant was directed to pay 69% of child care expenses while plaintiff was working, attending school, or in vocational training. Defendant was also directed to provide Kaitlyn with

health insurance coverage, and to pay 69% of Kaitlyn's non-reimbursed medical and related expenses.

Defendant is alleging that plaintiff has systematically interfered with the access to Kaitlyn which the stipulation provides to him. By order to show cause dated January 5, 2006, he sought to hold plaintiff in contempt.[1] Plaintiff cross-moved by cross motion dated January 27, 2006, seeking sanctions in the sum of $25,000, in the form of counsel fees. By so-ordered stipulation dated April 12, 2006, the motions were referred to me to hear and determine. The parties further stipulated that the issue of counsel fees could be resolved "on papers." The case was tried on June 20, and September 26, 2006, and was fully submitted on or about January 19, 2007.

It appears that scheduling of the weekend visits between Kaitlyn and her father has gone relatively smoothly. However, there has been friction over the Wednesday visitation, and one Monday in particular, which also coincided with Halloween. Defendant also alleges that plaintiff has systematically interfered with his telephone access to his daughter, and has failed to provide him with information concerning the child's medical condition and scholastic progress.

If defendant were successful in establishing a pattern of willful deprivation of defendant's visitation rights under the judgment of divorce, such behavior could constitute grounds for an adjudication of civil contempt pursuant to § 753 (A) (2) of the Judiciary law.

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[1]Defendant also requests a change of custody. However, the IAS Justice Presiding reserved this branch of the motion to herself, after the issue of contempt had been determined by me.

Entwistle v Entwistle, 61 AD2d 380 (2d Dept 1978). But even technical violations of the terms of the stipulation and Judgment will not support a finding of contempt, absent a showing that plaintiff's conduct "defeated, impaired, impeded or prejudiced" defendant's rights. ***Dwyer v De La Torre,*** 279 AD2d 854 (3d Dept 2001); ***Ray v Woodman,*** 244 AD2d 716 (3d Dept 1997).

Defendant is alleging interference with his visitation on July 28, August 18, October 6, October 20, November 3, and December 8 of 2004, and January 12 and 19, February 23, March 16-17, April 27-28, May 4, June 18-19, June 29, August 19,21,24 and 31, October 12, October 17, October 31, November 23,24,25, and December 14 of 2005.

Defendant's testimony as to what transpired on many of the days he claims to have been denied visitation, or had his visitation interfered with, was vague, or told only the part of the story most favorable to him. Defendant claims that his rights were impaired because plaintiff did not offer him any make-up time for certain missed visits, but inasmuch as defendant was not entitled to a make-up under the terms of the stipulation and/or Judgment[2], such an omission, even if true, cannot form the basis for a finding of contempt. *Howard v Howard,* 292 AD2d 345 (2d Dept 2002).

There are three areas in which defendant has a colorable claim: (1) plaintiff unilaterally interfered with defendant's visitation by scheduling a cruise with

---

[2]Justice Lobis did rule in one connection that defendant was entitled to make up time. But that order does not appear to be the basis for defendant's claims herein, and no issue was raised before me as to compliance therewith.

Kaitlyn to France, which precluded three periods of visitation; (2) plaintiff denied defendant visitation on Halloween, in spite of adequate notice that defendant desired to have such visitation; and (3) Kaitlyn refused to go with her father on visitation on a few of the occasions set forth. The custodial parent may not permit a child to decide for herself whether to have visitation with the noncustodial parent. *Labanowski v Labanowski,* 4 AD 3d 690 (3d Dept 2004).

Halloween occurred on a Monday in 2005. Prior to that date, defendant had never exercised his optional Monday night visitation. In view of that fact, plaintiff planned to spend the evening with Kaitlyn. She had arranged for herself and the child to participate in a seasonal activity with another family, and had purchased tickets for that event. When defendant requested to spend the evening with his daughter, plaintiff denied him the visitation.

In view of plaintiff's justifiable belief that defendant had foregone his Monday night visitation at the time she purchased the tickets, *Fellows Fuel Service, Inc. v Staley,* 117 AD2d 62 (3d Dept 1986), if there was a violation of the stipulation, it was *de minimus,* and cannot form the basis for a contempt citation. *Levin v Halvin Co., Inc.,* 63 AD2d 924 (1st Dept 1978).

Although the cruise to France interfered with defendant's visitation, plaintiff's counsel contacted defendant's counsel a month before the scheduled embarkation, and asked to negotiate replacement visitation. Initially, no accommodation could be reached, and defendant filed a police report against plaintiff, claiming that she had interfered with his visitation. Eventually, the parties were in agreement regarding the makeup for defendant's missed

visitation during the week that plaintiff and Kaitlyn were in France. (Tr. P. 24, 9-26-06). Under these circumstances, defendant cannot demonstrate that his rights to visitation with his daughter were defeated or impaired; thus, no finding of contempt is warranted.

With respect to Kaitlyn's refusal on a few occasions to accompany her father on visitation, I accept plaintiff's candid testimony that she encouraged the child to pleasurably anticipate visitation with her father because the ramifications for plaintiff were unpleasant if the child did not go. On the few occasions where Kaitlyn was adamant about not accompanying her father on visitation, he did not press the point. Similarly, when the child was ill, make-up time was scheduled. This testimony hardly establishes a pattern indicative of undermining the child's relationship with her father.

In addition to his vague and self-serving testimony, there are other problems with defendant's position that make his very standing to seek a contempt finding questionable.

Defendant often fails to give the requisite notice when he is cancelling a scheduled visitation, and he chronically brings Kaitlyn back late. Plaintiff has had to seek a judgment for arrears for unpaid child care. Defendant has unilaterally discontinued the meetings with the parenting counselor, who was stipulated to in order to improve the parties' ability to cooperate, and has refused to continue with the baby log. If defendant is not abiding by the letter of the stipulation, he has no standing to insist that plaintiff do so. *Milton v Dennis,* 99 AD2d 565 (3d Dept 1984).

" ... one who seeks (to hold a former spouse in contempt) must come into court with clean hands.

[Movant's] conduct in not complying with the terms of a stipulation incorporated into the judgment of divorce was such as to preclude the granting of his motion." *Pal v Pal,* 45 AD2d 738 (2d Dept 1974).

Defendant has failed to prove that plaintiff had interfered with his telephonic parental access to the child. He could not remember on what occasions this occurred, and plaintiff testified that when defendant did call, it was generally not to talk to the child, but to advise plaintiff that he was or was not going to exercise visitation.

There was initially a problem with the execution of the authorizations necessary to permit defendant to obtain the medical and scholastic information provided for in the stipulation. These were sent to the office of plaintiff's counsel, and lay on the desk of the associate who was handling the file during the associate's maternity leave. When the associate returned, the authorizations were provided, and defendant now has access to his daughter's treatment and educational information.

To the extent that there was blame to be placed, it lay with plaintiff's law firm, for failure to monitor the associate's desk during her absence from the office. Plaintiff herself cannot be held in contempt for the fault of another. *Educational Reading Aids Corp. v Young,* 175 AD2d 152 (2d Dept 1991).

In sum, I find and determine that defendant has failed to satisfy his burden of proof: that plaintiff's conduct defeated, impaired, impeded or prejudiced defendant's rights with respect to his parental access to Kaitlyn. *Ray v Woodman,* 244 AD2d 716 (3d Dept 1997).

THE CROSS MOTION

Plaintiff cross-moves, pursuant to 22 NYCRR 130-1.1, to sanction defendant, by directing that defendant pay the sum of $25,000 for counsel fees incurred in defending this proceeding, and for related relief. Plaintiff contends that the basis for the cross motion is that defendant's cross motion is "meritless, false and frivolous."

§ 130-1.1 of the Rules of the Chief Administrator of the Courts reads as follows:

> "Costs; Sanctions
>
> (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part.
>
> ********
>
> (c) For purposes of this Part, conduct is frivolous if;
> (1) It is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Defendant is clearly very hostile to plaintiff. I do not know the reason. However, the record indicates that plaintiff has brought more than one proceeding to compel defendant to pay his child support. Plaintiff testified credibly that defendant directs invective and obscenities at her in the context of visitation. On one occasion, plaintiff had defendant's visitation suspended when defendant left Kaitlyn in his car at night, when he went into a strip mall vendor to purchase beer. But it cannot be said, on this record, that defendant brought this proceeding to solely harass or maliciously injure the plaintiff. *Ashley v Delarm,* 234 AD2d 736 (3d Dept 1996).

However, it is obvious, particularly from an examination of defendant's testimony given at the contempt hearing, that he is guilty of frivolous conduct by making material, factual false statements.

Plaintiff initially sought a counsel fee award of $25,000, which increased to approximately $50,000 as a result of the hearing and post-hearing submissions. At the time of the cross motion, plaintiff had paid her attorney a retainer of $10,000, and had bills in the amount of $16,992.01.

Defendant has raised a number of objections to an award of counsel fees, the most compelling of which is that the plaintiff and counsel did not execute a new retainer agreement, and the agreement which they entered at the inception of the representation does not cover counsel fees for post-judgment matters. However, the IAS Justice presiding has previously awarded counsel fees based upon the same

retainer agreement, in a decision and order dated March 15, 2006. The adequacy of the retainer agreement is thus the law of the case.

The lead/trial attorney for plaintiff charges an hourly rate of $400, which is reasonable. A former associate of the firm, who was the laboring oar, billed at a rate of $300 per hour, which is also reasonable. I find that plaintiff is entitled to a counsel fee award of $15,000[3], attributable to the portion of the defendant's application seeking to hold plaintiff in contempt.

Accordingly, it is

ORDERED, that the motion to hold plaintiff in contempt is denied; and it is further

ORDERED that the cross motion is granted to the extent that plaintiff shall have judgment against defendant in the sum of $15,000, with costs and disbursements as taxed by the Clerk. Let judgment be entered accordingly.

Dated: February 5, 2007

ENTER
/S
MARIAN LEWIS, SPECIAL REFEREE

[3]Defendant indicated that he wished to make a motion for counsel fees. That issue was not referred to me. He is relegated to making the motion before the IAS Justice, who has retained his application for a change of custody.